

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

In re Application of: Vivian A. Schramm et al.	§	Group Art Unit: 1761
	§	
Serial No.: 09/707,156	§	Examiner: Kelly Jo Bekker
	§	
Filed: November 06, 2000	§	Docket: MRS-015U
	§	
For: Spill-Proof Candy Container	§	Conf No.: 8663

REPLY BRIEF

Commissioner of Patents
Alexandria, VA 22313-1450

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electronically transmitted to the
patent office via an EFS-Web
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Dear Sir:

Pursuant to 37 CFR § 41.41, appellant submits this Reply Brief to the Board of Patent Appeals and Interferences in response to the Examiner's Answer mailed December 9, 2010.

(10) Response to Argument:

Appellants respectfully urge that the rejections reiterated in the Examiner's Answer are substantively similar to the October 26, 2009 examiner's final rejection. Accordingly, appellants will limit their comments to the issues raised in the "Response to Argument" section of the Examiner's Answer.

The examiner urges that the, "*appellant's arguments in regards to the 112 rejection ... are not convincing*" because "*it is not seen that the figures can be used to support spatial, including volumetric, relationships between elements*". In response, appellants rhetorically but respectfully ask, if the drawing figures cannot be used to support spatial, including volumetric, relationships between elements", why then does the office require drawings at all and for what use are drawings required?

Appellants respectfully point out that the drawings originally filed with the instant application and as created by appellants satisfy the requirements of (mechanical) orthographic projection. Appellants respectfully point out that the examiner has not alleged otherwise. Given that the drawings comply with the standards of basic orthographic projection, appellants respectfully urge that the drawings are exceedingly clear in their intended purpose (e.g. the depiction of "*A substantially spherically shaped container having an inner cavity of a predetermined volume and an open funnel of a predetermined volume extending into the inner cavity, and wherein the container removably contains at least one of an edible particulate candy substance, a candy article substance, and a combination of an edible particulate candy substance and a candy article substance, and wherein the candy article substance includes a handle portion connected thereto, and wherein the volume within the container occupied by the edible particulate candy substance defines a volume that is no more than one half of the result of the container volume minus the funnel volume*") and that the drawings do in-fact support the disputed claim language.

In a first example, appellants point out for instance that the examiner urges that the drawing figures cannot be used to support the recitation of claim 8 of "*a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of said container volume*". Appellants respectfully but adamantly aver that the examiner's urging is indisputably unsupported by the facts of the case. Drawing figure 1 shows a substantially isometric view of assembled container 26. Container 26 is indisputably depicted as a substantially hollow spherically shaped container. Appellants note that lower container member 20 and upper container member 30 are described as "substantially hollow semi-hemispherically shaped" (see for instance the specification, page 6, 1st paragraph). As indicated in the specification (see for instance the

specification under the heading “DESCRIPTION OF DRAWINGS”), “**Figure 3A** is an orthographic section view of the container assembly taken substantially through the center of the container assembly”. Also as indicated in the specification (see for instance the specification under the heading “FEATURE TABLE”), feature 60 is disclosed as “*edible particulate matter*”. It is clear and indisputable that in figure 3A, edible particulate matter 60 is depicted as being a volume of edible particulate matter that occupies a space of less than half of the volume of spherical container 26. This fact is corroborated by figures 3B and 3C which continue to depict edible particulate matter 60 as being a volume of edible particulate matter that occupies a space of less than half of the volume of spherical container 26 when container 26 is oriented in different (sideways and upside-down) orientations. Appellants respectfully point out that in none of figures 3A, 3B, or 3C does edible particulate matter 60 rise to the level of half (or the center of) container 26. Thus in distinct contradiction to the examiner’s urging, appellants respectfully urge that it is shown that the recitation “*a volume within said container occupied by said edible particulate candy substance defines a volume that is no more than one half of said container volume*” is indisputably supported by the drawing figures.

In a second example, appellants point out for instance that the examiner urges that the drawing figures cannot be used to support the recitation of claim 21 of “*wherein said funnel second open end and said candy article are adapted such that when said candy article is inserted within said container inner cavity a substantial gap is formed between said funnel second open end and said candy article, and wherein the diameter of said candy article substantially exceeds the diameter of said handle such that when said container is repositioned from a first position to a second position said gap and said difference in the size of said diameters of said candy article and said handle cooperate so as to provide for the flow of said edible particulate candy substance through said gap and around substantially the entire exterior of said candy article*”. Appellants respectfully but adamantly aver that the examiner’s urging is indisputably unsupported by the facts of the case. For convenience in establishing that the indicated recitation is supported by appellant’s specification/drawings, appellants will subdivide the disputed recitation into three sub-limitations. With respect to the first sub-limitation of “*when said candy article is inserted within said container inner cavity a substantial gap is formed between said funnel second open end and said candy article*”, drawing figure 3A for instance clearly shows a candy article (lollipop 40) inserted within the inner cavity of container 26, and a gap (i.e. the space between the parts) is shown between the candy article (lollipop 40) and the funnel second open end (funnel lower opening 37). With respect to the second sub-limitation of “*the diameter of said candy article*

substantially exceeds the diameter of said handle”, drawing figure 3A for instance clearly shows the diameter of the candy article (lollipop 40) as substantially exceeding the diameter of the handle (lollipop handle 44). By measuring the respective diameters of the candy article and the handle, a ratio of approximately 10X (the diameter of the candy article being approximately 10 times the diameter of the handle) is measurable. Appellants respectfully urge that a ratio of 10 to 1 satisfies the recitation of “substantially exceeds”. With respect to the third sub-limitation of “when said container is repositioned from a first position to a second position said gap and said difference in the size of said diameters of said candy article and said handle cooperate so as to provide for the flow of said edible particulate candy substance through said gap and around substantially the entire exterior of said candy article”, drawing figure 3B for instance clearly shows the container assembly in a first position with edible particulate candy substance (edible particulate matter 60) in a side area of the inner cavity of container 26 and not coating, covering or in contact with candy article (lollipop 40), and with the gap between the candy article (lollipop 40) and the funnel second open end (funnel lower opening 37) being empty or free of the candy substance (edible particulate matter 60). Drawing figure 3A further for instance clearly shows the container assembly 26 in repositioned to a second position with edible particulate candy substance (edible particulate matter 60) substantially completely coating, covering or in contact with candy article (lollipop 40), and occupying at least a portion of the gap between the candy article (lollipop 40) and the funnel second open end (funnel lower opening 37). Appellants respectfully point out that it is the same principal of gravity as cited by the examiner in the Examiner’s Response that cooperates with edible particulate candy substance (edible particulate matter 60) to cause edible particulate candy substance (edible particulate matter 60) to flow through the gap. Appellants again respectfully point out that the viscosity of edible particulate candy substance such as a candy powder is different than the viscosity of liquids such as bubble solution or egg dyes, and that such edible particulate candy substance cannot be merely substituted for a liquid of the prior art in prior art spill resistant containers and still function as intended. Furthermore, appellants respectfully point out that none of the prior art taught appellants invention as described in the disputed recitation. Thus in distinct contradiction to the examiner’s urging, appellants respectfully urge that it is shown that the recitation “when said container is repositioned from a first position to a second position said gap and said difference in the size of said diameters of said candy article and said handle cooperate so as to provide for the flow of said edible particulate candy substance through said gap and around substantially the entire exterior of said candy article” is indisputably supported by the drawing figures.

The examiner urges that, “*appellant’s make the broad statement that the claim limitations are not taught by the prior art but fail to point out any reasons why appellant’s believe this*” and “*Appellant’s arguments fail to comply with 37 CFR S 1.111(b) because they amount to a general allegation that the claims define a patentable invention without specifically pointing out how the language of the claims patentably distinguishes them from the references*”. In response, appellants respectfully point out that several times appellants have painstakingly described how appellant’s claims define over the art and how appellant’s claims are free of new matter. However, with respect to the examiner’s obviousness rejections, appellants respectfully point out that the examiner has failed to make a prima facie case of obviousness. Further, appellants respectfully urge that having failed to make such prima facie case of obviousness, rather establishing that the combination of the cited references teach each and every limitation of appellant’s claims, the examiner would shift the burden of proof (of nonexistence) to appellants. Or stated somewhat differently, appellants cannot specifically point to that which does not exist. Thus for instance, appellants cannot recite per se the precise location in the prior art where appellants claim limitations do not exist since those claim limitations not taught by the prior art do not exist “everywhere” (i.e. anywhere) in the cited art.

Appellants respectfully point out that the drawings originally filed with the instant application were created by appellants under the premise a reader of the drawings would have at least a rudimentary understanding of (mechanical) orthographic projection. On this basis, appellants respectfully urge that the drawings are exceedingly clear and that the drawings do in-fact support the disputed claim language.

Conclusion

For the reasons above, it is believed that the rejections should be reversed.

DATE: January 15, 2011

Respectfully submitted,

A handwritten signature in cursive script, reading "Michael R. Schramm". The signature is written in dark ink and is positioned above a horizontal line.

Michael R. Schramm
Reg. No. 56,441
Agent for the Appellant
801-710-7793